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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 CARLOS HERNANDEZ,)
9 Plaintiff,)
vs.)
10)
11 WELLS FARGO FINANCIAL)
12 NATIONAL BANK,)
13 Defendant.)

Date of Hearing: March 20, 2014
Time of Hearing: 9:00 AM

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14 **PLAINTIFF'S RESPONSE TO DEFENDANT'S**
15 **MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

16 **I**

17 **PREFATORY**

18 Defendant is incorrect in its assertion that its reporting is
19 accurate as a matter of law. First, in attempting to establish its
20 ostensible accuracy, Defendant invokes two unpublished cases
21 neither of which cite the applicable Ninth Circuit authority, Drew
22 v. Equifax Information Services, LLC, 690 F.3d 1100, 1108 (9th Cir.
23 2012). One of the unpublished opinions, Molton v. Experian
24 Information Solutions, Inc., 2004 WL 161494, at *5 (N.D. Ill. Jan
25 21, 2004), references the Eleventh Circuit's opinion in Cahlin v.
26 General Motors Acceptance Corp., 936 F.2d 1151 (11th Cir. 1991) in
27 an errant attempt to define accuracy under the FCRA. The glaring
28 problem with Cahlin [other than it's old and not a Ninth Circuit

1 opinion] is that it preceded the establishment of the 1996
2 furnisher amendments under which liability under FCRA § 1681s-2(b)
3 was framed. It's a case against a national credit reporting
4 entity, not a furnisher as defined. Please see Nelson v. Chase
5 Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002).¹
6 Defendant's second case, Bolick v. DFS Services, LLC, No. 10-05211,
7 2011 WL 4359987, at *2 (E.D. Pa. Sept. 16, 2011), is a two page
8 decision dismissing the complaint of a *pro se* litigant who "failed
9 to submit *any* evidence to substantiate his claim."

10 Second, as referenced in ¶ 19 of the Amended Complaint,
11 Defendant has ignored basic credit reporting industry standards,
12 Cassara v. DAC Services, Inc., 276 F.3d 1210, 1225 (10th Cir. 2002).
13 Metro 2 is a reporting format used by furnishers like Defendant.
14 The very format embraced by the credit reporting industry itself
15 requires furnishers like Defendant to both acknowledge the
16 transferred status of any account as well as the account's paid
17 status.

II

ARGUMENT OF LAW

20 A. Congress Enacted the FCRA to Enhance the Strength and
21 Competitiveness of the Consumer Credit Economy

22 Congress enacted the FCRA in 1970 as Title VI of the Consumer
23 Credit Protection Act, 15 U.S.C. §§ 1601-1693r ("CCPA"), its
24 omnibus act regulating the consumer credit industry. A recurring,
25 core CCPA theme is that prudent dissemination of accurate credit
information is essential to maintain the vitality of the credit

28 |¹ Counsel for Plaintiff represented Mr. Nelson.

1 granting system in a competitive and open marketplace to insure the
 2 health of the nation's multi-trillion dollar consumer credit
 3 economy and the well being of all its participants, creditors and
 4 consumers alike.² Congress thus made the following formal findings
 5 in adopting the FCRA:

6 The banking system is dependent upon fair and accurate
 7 credit reporting. Inaccurate credit reports directly
 8 impair the efficiency of the banking system, and unfair
 9 credit reporting methods undermine the public confidence
 10 which is essential to the continued functioning of the
 11 banking system.

12 § 1681(a)(1).

13 Congress enacted the FCRA with the expressed purpose to enable
 14 credit grantors and others to be in the best position to make
 15 reliable lending and other business decisions. § 1681(a) and (b).
 16 Likewise, the Truth in Lending Act, Title I of the CCPA,
 17 establishes the corresponding principle that consumers are best
 18 served through their own "informed use of credit." 15 U.S.C. §
 19 1601(a). "Congress enacted the Truth in Lending Act in part
 20 because it believed consumers would individually benefit not only
 21 from the more informed use of credit, but also from heightened
 22 competition which would result from more knowledgeable credit
 23 shopping." Till v. SCS Credit Corp., 541 U.S. 465, 482, 124 S.Ct.
 24 1951, 1963 (2004) (quotation and footnote omitted). The Supreme
 25 Court stated the guiding principle of this congressional philosophy

27 2 Total outstanding consumer credit as of September 2011 was nearly
 28 \$2.5 trillion. See
<http://www.federalreserve.gov/Releases/G19/Current>.

1 nearly 40 years ago: "[B]lind economic activity is inconsistent
 2 with the efficient functioning of a free economic system such as
 3 ours." Mourning v. Family Publication Serv., Inc., 411 U.S. 356,
 4 364, 93 S.Ct. 1652, 1658 (1973). Simply put, the viability of our
 5 credit economy depends on accurate information; Congress designed
 6 the FCRA to increase that accuracy.

7 In 1996 Congress amended the FCRA [Pub.L. 104-208 (Sept. 30,
 8 1996)], as explained by the Senate Report:

9 Currently, the FCRA contains no requirements
 10 applying to those entities which furnish information to
 11 consumer reporting agencies. Section 413 imposes certain
 12 obligations upon those furnishers of information to
 13 consumer reporting agencies. The Committee believes that
 14 bringing furnishers of information under the provisions
 15 of the FCRA is an essential step in ensuring the accuracy
 16 of consumer report information.

17
 18 S. Rep. 104-185, 104th Cong., 1st Sess. 49 (1995); see Nelson v.
 19 Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059-60 (9th Cir.
 20 2002).

21 Among the changes that Congress made was to enact §
 22 1681i(a)(2), which compels CRAs to promptly notify the furnisher of
 23 disputed information of the consumer's dispute, and § 1681s-2,
 24 which imposes on those furnishers of information, such as
 25 Defendant, detailed and specific responsibilities, including the
 26 following duties in subsection (b) [as later amended Pub.L. 108-159
 27 (Dec. 4, 2003)] that are triggered by the CRA's dispute
 28 notification and that Defendant violated here:

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1 b) Duties of furnishers of information upon notice of dispute

2 (1) In general

3 After receiving notice pursuant to section 1681i(a)(2) of
4 this title of a dispute with regard to the completeness
5 or accuracy of any information provided by a person to a
6 consumer reporting agency, the person shall--

7 (A) conduct an investigation with respect to
8 the disputed information;

9 (B) review all relevant information provided
10 by the consumer reporting agency pursuant to
 section 1681i(a)(2) of this title;

11 (C) report the results of the investigation to
 the consumer reporting agency;

12 (D) if the investigation finds that the
 information is incomplete or inaccurate,
 report those results to all other consumer
 reporting agencies to which the person
 furnished the information and that compile and
 maintain files on consumers on a nationwide
 basis; and

16 (E) if an item of information disputed by a
17 consumer is found to be inaccurate or
18 incomplete or cannot be verified after any
19 reinvestigation under paragraph (1), for
 purposes of reporting to a consumer reporting
 agency only, as appropriate, based on the
 results of the reinvestigation promptly--

20 (i) modify that item of information;

21 (ii) delete that item of information;
22 or

23 (iii) permanently block the reporting
 of that item of information.

25 Federal Courts of Appeals long ago established that the §
26 1681s-2(b)(1)(A) directive to furnishers to "conduct an
27 investigation with respect to the disputed information" required a
28 "reasonable investigation," that is, a "careful" or "searching"

1 inquiry," as opposed to a "superficial" one, "to determine whether
 2 the disputed information can be verified." Johnson v. MBNA America
 3 Bank, NA, 357 F.3d 426, 430-31 (4th Cir. 2004); accord Westra v.
 4 Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005). The
 5 Courts of Appeals continue to unanimously follow this "reasonable
 6 investigation" standard. Gorman v. Wolpoff & Abramson, L.L.P., 584
 7 F.3d 1147, 1157 (9th Cir. 2009); Chiang v. Verizon New England
 8 Inc., 595 F.3d 26, 37 (1st Cir. 2010).

9 In addition, before the operative events here, federal
 10 precedent had also established that § 1681s-2(b)(1)(C)'s duty to
 11 "report the results of the investigation to the consumer reporting
 12 agency" incorporates the obligation from § 1681s-2(a) "that
 13 furnishers have a general duty to provide accurate and complete
 14 information" to the CRAs when so responding. Saunders v. Branch
 15 Banking and Trust Co. Of Va., 526 F.3d 142, 149-50 (4th Cir. 2008).

16 The context within which to evaluate Defendant's compliance
 17 with § 1681s-2(b)(1)(C) is the function that furnishers'
 18 investigation reports serve for the credit reporting agencies
 19 (CRA). A CRA is obligated, once it receives the furnisher's
 20 report, to determine not only whether the disputed information is
 21 "inaccurate or incomplete" but also whether it "cannot be
 22 verified." § 1681i(a)(5)(A). This task is at the core of the
 23 "grave responsibilities" that Congress entrusted to the CRAs. 15
 24 U.S.C. § 1681(a)(4). It is a task that demands independent
 25 evaluation, which naturally requires "more than merely parrotting
 26 information" received from the furnisher. Cushman v. Trans Union
 27 Corp., 115 F.3d 220, 225 (3rd Cir. 1997). After all "[t]he FCRA is
 28 intended to safeguard against the improper reporting of information

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1 on a credit report (either by the credit reporting agency or by the
 2 furnisher of credit information) and against the improper
 3 disclosure of a credit report." Myers v. Bennett Law Offices, 238
 4 F.3d 1068, 1074 (9th Cir. 2001).³

5 Like many furnishers of information, Defendant has a strong
 6 collection incentive to prevent the CRAs from performing their
 7 duties as Congress has directed. Defendant's conduct in merely
 8 serially parrotting verifications would virtually eliminate the
 9 CRA's ability to make substantive evaluations of disputed
 10 information. That restriction in turn would allow creditors, as
 11 Defendant unfortunately demonstrated here, to have a free hand in
 12 using the credit reporting system as a pressure point on vulnerable
 13 consumers. See, Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R.
 14 1993) (a creditor's report of a credit card debt to a CRA is a
 15 "powerful tool designed, in part, to wrench compliance with payment
 16 terms from its cardholder"); accord, Matter of Sommersdorf, 139
 17 B.R. 700, 701 (Bankr.S.D.Ohio 1991); Ditty v. CheckRite, Ltd.,
 18 Inc., 973 F.Supp. 1320, 1331 (D. Utah 1997). Allowing the CRAs to
 19 perform their duties as Congress intended requires furnishers to
 20 report accurate investigation information to the CRAs and not
 21 withhold material information that might aid the CRAs in reaching
 22 either a conclusive decision or a decision that the information is
 23 unverifiable. See, Johnson v. MBNA America Bank, N.A., 357 F.3d at
 24 426, 432 and n. 4 (4th Cir. 2004).

25

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³ Counsel for Plaintiff represented Mr. Myers.

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1 B. Accuracy under the FCRA.

2 The Ninth Circuit has defined *accuracy* in an FCRA furnisher
 case:

3 "[A]n item on a credit report can be 'incomplete or
 4 inaccurate' ... 'because it is patently incorrect, or
 5 because it is misleading in such a way and to such an
 6 extent that it can be expected to adversely affect credit
 7 decisions.' " Carvalho v. Equifax Info. Svcs., LLC, 629
 8 F.3d 876, 890 (9th Cir.2010) (quoting Gorman, 584 F.3d at
 9 1163) (emphasis added). Although we have never squarely
 10 addressed the issue, our precedent suggests that, at the
 11 very least, information that is inaccurate "on its face,"
 12 is "patently incorrect." Id. at 891 (noting that there
 13 was no "patent error" because the information reported
 14 was "correct on its face"); see also Koropoulos v. The Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir.1984)
 15 (suggesting that under § 1681e, a CRA is liable for
 16 reporting information that is "technically untrue," as
 17 well as in various other circumstances). A jury may well
 18 find that reporting the fraudulently opened account as a
 19 lost or stolen account belonging to Drew was untrue or
 20 facially inaccurate. Drew v. Equifax Information Services, LLC, 690 F.3d 1100, 1108 (9th Cir. 2012).

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14 Any mere technical accuracy of Defendant's reporting does not
 15 achieve FCRA compliance. The FCRA requires more than technical or
 16 literal accuracy; it requires "maximum possible accuracy of the
 17 information concerning the individual about whom the report
 18 relates." § 1681e(b). To ensure that reporting agencies meet this
 19 exacting standard, the FCRA authorizes a consumer to institute the
 20 dispute process as Plaintiff did here to challenge the
 21 "completeness or accuracy" of any reported item. § 1681i(a)(1)(A).

22 The District of Columbia Circuit has condemned this type of
 23 incomplete and misleading entry:

24 First of all, we do not agree with the district court
 25 that section 1681e(b) makes a credit reporting agency liable
 26 for damages only if the report contains statements that are
 27 technically untrue. Congress did not limit the Act's mandate
 28 to reasonable procedures to assure only technical accuracy; to
 29 the contrary, the Act required reasonable procedures to assure
 30 "maximum accuracy." The Act's self-stated purpose is "to
 31 require that consumer reporting agencies adopt reasonable

1 procedures for meeting the needs of commerce for consumer
 2 credit . . . in a manner which is fair and equitable to the
 3 consumer, with regard to the confidentiality, accuracy,
 4 relevancy, and proper utilization of such information." 15
 5 U.S.C. 1681e(b). Certainly reports containing factually
 6 correct information that nonetheless mislead their readers are
 7 neither maximally accurate nor fair to the consumer who is the
 8 subject of the reports.

9

10 Applying that interpretation in this case, we find that
 11 the district court's dismissal of the Koropoulos' claims by
 12 summary judgment on the grounds that the information in the
 13 report was technically accurate, regardless of any confusion
 14 generated in the recipients' minds as to what it meant, was
 15 improper. We find there is a genuine issue of fact as to
 16 whether the report was sufficiently misleading so as to raise
 17 the issue of whether CBI's procedures for assuring "maximum
 18 possible accuracy" were reasonable.

19

20 Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40, 42 (D. C. Cir.
 21 1984).

22 The Fifth Circuit explained Congress' rejection of a mere
 23 technical accuracy standard under circumstances where a consumer
 24 report stated with regard to the consumer's account, "Litigation
 25 Pending:"

26 Turning to liability under § 1681e(b), any person could easily
 27 have construed the notation "Litigation Pending" as an
 28 indication that the plaintiff was being sued by Sherwin-
 1 Williams, while the actual situation was the reverse. It
 2 would have been a simple matter to prevent this ambiguity,
 3 particularly in light of Chilton's knowledge of Pinner's
 4 dispute with Sherwin-Williams.

5

6 Pinner v. Schmidt, 805 F. 2d 1258, 1262-63 (5th Cir. 1986).

7 Other courts agree that even "a technical truth . . . can be
 8 as misleading as an outright untruth where it paints a misleading
 9 picture." Swoager v. Credit Bureau of Greater St. Petersburg, 608
 10 F. Supp. 972, 977 (M.D. Fla. 1985) (entry misleadingly coded). In
 11 Alexander v. Moore & Associates, Inc., 553 F. Supp. 948, 952 (D.
 12

1 Haw. 1982), the court posited another example illustrative of the
2 defect in Defendant's "corrected" entry:

3 [Section 1681e(b)] does not require that a consumer reporting
4 agency follow reasonable procedures to assure simply that the
5 consumer report be "accurate," but to assure "maximum possible
6 accuracy". Otherwise it would seem that a consumer reporting
7 agency could report that a person was "involved" in a credit
8 card scam, and without regard to this section fail to report
9 that he was in fact one of the victims of the scam. This
10 result cannot have been contemplated under the Act.

11 The Fourth Circuit agrees that "A report is inaccurate when it
12 is 'patently incorrect' or when it is 'misleading in such a way and
13 to such an extent that it can be expected to [have an adverse]'
14 effect. Sepulvado v. CSC Credit Servs., 158 F.3d 890, 895 (5th
15 Cir. 1998)."Dalton v. Capital Associated Indus., Inc., 257 F.3d
16 409, 415 (4th Cir. 2001) (if report could be read as stating that
17 Dalton was found guilty of a felony, when he pled to a
18 misdemeanour, its inaccuracy would be established). As applied to
19 this case, if the report could be read as stating that Plaintiff's
20 account was neither transferred nor paid, its inaccuracy is
21 established.

22 The standard for accuracy under the FCRA is not *sui generis*.
23 This type of critical omission of a material fact also constitutes,
24 for example, misrepresentation under common law (Restatement of
25 Torts (Second), §§ 529, 551) and deception under the Federal Trade
26 Commission Act of 1934. Sterling Drug, Inc. v. FTC, 741 F.2d 1146,
27 1154 (9th Cir. 1984) ("failure to disclose material information may
28 cause an advertisement to be deceptive, even if it does not state
false facts"); Simeon Management Corp. v. FTC, 579 F.2d 1136, 1146
(9th Cir. 1978) (deceptive to omit material fact which could affect
the consumer's decision to buy); Resort Car Rental System, Inc. v.

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1 FTC, 518 F.2d 962, 964 (9th Cir. 1975) (trade name Dollar-A-Day has
 2 a decisive connotation which is deceptive).

3 C. The Ninth Circuit has defined accuracy in an FCRA
 4 furnisher case in the Disjunctive.

5 Information on a credit report is inherently inaccurate if it
 6 is either patently incorrect or misleading, *Drew*, 1108 (pg. 8,
 7 *supra*). Here Defendant neither reported the account's paid status-
 8 notwithstanding explicit notice-nor its subsequent transfer.
 9 Plaintiff's dispute was not only sent to the national credit
 10 reporting agencies, but also, Defendant itself (Amended Complaint,
 11 Exhibits 1-3). Despite the crystal clarity of Plaintiff's dispute
 12 Defendant facilely "verified" the accuracy of its reporting sans
 13 any reference to either the account's paid status or that the
 14 account had been transferred. Further, in an obvious effort to
 15 correct the misleading nature of its reporting Defendant finally
 16 updated Plaintiff's account to include both the paid status and its
 17 subsequent transfer (Amended Complaint, Exhibits 4-5). This
 18 attempt to clarify the status of the account exemplifies its
 19 inherently misleading status.

20 In 2002, the honorable Lloyd D. George, Senior District Court
 21 Judge, rendered a decision holding that a subsequent
 22 "clarification" of an account status belies its previous misleading
 23 content:

24 Ironically, in an effort to show this Court that the
 25 credit report is not misleading, Experian points out that
 26 the Spellman's credit report itself notes that the
 27 "Primary borrower filed bankruptcy." However, and in an
 28 apparent effort to ensure that this Court recognizes that

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1 "primary borrower" does not refer to Spellman but to his
 2 former spouse, Kathleen, Experian's quote to this Court
 3 from the credit report modifies the sentence by adding
 4 the name of the former spouse in square brackets:
 5 "Primary borrower [Kathleen Spellman] filed bankruptcy."
 6 Experian's resort to modifying the credit report to
 7 specifically identify Kathleen as the primary borrower
 8 best exemplifies that Spellman has adequately alleged
 9 that the credit report is misleading Spellman v. Experian
 10 Information Solutions, Inc., 2002 WL 799876 (D. Nev
 11 2002).⁴

12 Here Defendant's resort to modifying Plaintiff's tradeline
 13 "best exemplifies" that its prior reporting is indeed misleading.

14 D. It Is Essential That Defendant "Speak the Same Language"
 15 as the Remainder of the Credit Industry.

16 In Cassara v. DAC Services, Inc., 276 F.3d 1210, 1225 (10th Cir.
 17 2002), the 10th Circuit recognized the essential nature of a common
 18 industry language, standard and reporting framework prerequisite to
 19 maximizing the accuracy of information contained in a consumer's
 20 report. Here, the Defendant failed to comport with the industry
 21 standard, notwithstanding evident means to achieve it.

22 But if employers in that industry are to communicate
 23 meaningfully among themselves within the framework of the
 24 FCRA, it proves essential that they speak the same
 25 language, and that important data be reported in
 26 categories about which there is genuine common

27
 28 ⁴ Counsel for Plaintiff represented Mr. Spellman.

1 understanding and agreement. Likewise, if DAC is to
 2 "insure maximum possible accuracy" in the transmittal of
 3 that data through its reports, it may be required to make
 4 sure that the criteria defining categories are made
 5 explicit and are communicated to all who participate.

6 *Id.*

7 As noted, Metro 2 software is used by the credit reporting
 8 industry to establish applicable uniform standards:

9 Metro 2 is a standardized reporting format used by
 10 furnishers to provide information about customer accounts
 11 to CRAs. The Metro format software had been around since
 12 the 1970s. Metro 2 is the version created after the 1996
 13 amendments to the FCRA. It was designed by the credit
 14 reporting industry, including the so-called "Big Three"
 15 nationwide CRAs: Equifax, Experian and Trans Union.

16 The Metro 2 format and instructions are available
 17 for users from CDIA and from each of the major CRAs.
 18 CDIA's website also contains valuable information about
 19 Metro 2. The format and instructions were initially
 20 published in 2000 as the Credit Reporting Resource Guide,
 21 which is updated periodically. The book is also called
 22 The Metro 2 Manual. Fair Credit Reporting, 8th Edition,
 23 pg. 245, National Consumer Law Center, 2013.

24 Attached as Exhibit 1 is an excerpt from the Credit Reporting
 25 Resource Guide. Exhibit 1 reflects the Industry Standard which
 26 requires, if applicable, both annotation of the account's status to
 27 reflect both payment in full for less than the full balance and
 28 transfer of the account. Defendant initially provided neither of

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1 these revisions instead reporting the account as a charge-off
2 without any regard to the transfer (Amended Complaint, Exhibit 4).
3 Defendant failed to make the necessary revisions until after this
4 action was filed (Amended Complaint, Exhibit 5).

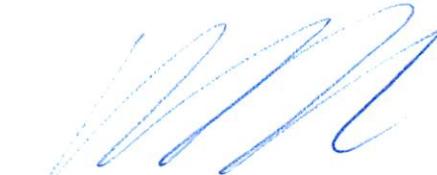
5 **III**

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiff requests the denial of
8 Defendant's Motion to Dismiss.

9 Dated: February 10, 2014

10 Respectfully submitted,



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12
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EXHIBIT I

Exhibit 6

Special Comment Codes

By Category Within Portfolio

Category	Description	Credit Line	Installment	Mortgage	Open	Revolving
Special Payment Arrangements, continued	Voluntarily Surrendered, then Redeemed	-	AO	-	-	AO
	Account Paid in Full for Less than the Full Balance	AU	AU	AU	AU	AU
	Account Paid from Collateral	AX	AX	-	-	AX
	Paid by Company which Originally Sold the Merchandise	-	BN	-	-	-
	Paid through Insurance (Requires Account Status Code 13 or 61-65 and Current Balance = 0)	BP	BP	BP	BP	BP
	Principal Deferred/Interest Payment Only	-	BT	-	-	-
Transferred	Account Closed Due to Transfer	AT	AT	AT	AT	AT
	Loan Assumed by Another Party (Requires ECOA Code T — Terminated)	-	H	H	-	-
	Account Transferred to Another Lender	O	O	O	O	O
	Purchased by Another Lender	AH	AH	AH	AH	AH
	Student Loan — Permanently Assigned to Government	-	AL	-	-	-
	Account Acquired by RTC/FDIC/NCUA	AN	AN	AN	AN	AN
	Transferred to Recovery (Requires Account Status Code 71-97)	BA	BA	BA	BA	BA